A

KDE RECREATION BHD

v.

LOW HAN ONG & ORS

B

COURT OF APPEAL, PUTRAJAYA
ABDUL KADIR SULAIMAN JCA
ABDUL AZIZ MOHAMAD JCA
HASHIM YUSOFF JCA
[CIVIL APPEAL NO: W-04-4-02]

C

23 FEBRUARY 2006

CIVIL LAW ACT: *Damages - Fatal accident - Appeal against quantum - Whether manifestly excessive - Onus of proof - Civil Law Act 1956, s. 7(3)*

D

DAMAGES: *Fatal accident - Quantum, appeal against - Whether manifestly excessive - Onus of proof - Civil Law Act 1956, s. 7(3)*

A lady drowned on 23 August 1992 ("deceased") in a swimming pool run by the appellant. The first respondent is the spouse and
E the second to seventh respondents are her children. The deceased during her lifetime was a housewife not earning an income and had engaged a maid to assist in the daily running of the household. After her death the family obtained the help of an additional maid who was paid around RM700 per month. In November 1996, the
F first respondent remarried. On 10 June 1993, the first to seventh respondents took out a writ in the Sessions Court against the appellant for negligence resulting in the death of the deceased. The respondents obtained judgment against the appellant and the court awarded special and general damages wherein general
G damages were given *vide* a global award of RM100,000 ("said decision"). The appellant appealed to the High Court against the said decision which said appeal was dismissed both as against liability and quantum and the appellants then appealed to this court.

H

The sole issue that is raised by the appellant *vide* this appeal is whether the award of general damages made by the Sessions Court and subsequently affirmed by the High Court, amounting to RM100,000 is manifestly excessive, unjustified and unsupported in
I all circumstances of the case.

Held (appeal allowed with costs and the amount of RM100,000 awarded by the Sessions Court and subsequently affirmed by the High Court substituted with the sum of RM34,000)

Per Abdul Kadir Sulaiman & Hashim Yusoff JJCA:

(1) No proper or adequate basis was given by the learned judge for awarding the respondents the sum of RM100,000 as general damages. It was purely on the basis of exercising her discretion in the matter as there is no yardstick to work out the exact figure. It is trite that when we talk of discretionary exercise of power, it must be based on settled legal principles, which is one of judicial discretion and not personal discretion. The learned Sessions Court in making a global award in the sum of RM100,000 by exercising her so-called discretion without any basis being shown for the same is clearly a wrong exercise of her power and on the evidence adduced, is manifestly excessive. (paras 8 & 17)

(2) The first respondent upon the death of the deceased had to employ an additional housekeeper to continue with the daily running of the household. This is indeed a monetary loss which has been the direct result of the negligence of the appellant. Hence an award under this head ought to have been made RM24,000 – s. 7(3) of the Civil Law Act 1956 ("the Act"), *(Neo Kim Soon (Administrator of the estate of Phanna Mannechuang, deceased) v. Subramaniam Ramanaidu & Anor* (foll)). (para 12)

(3) Damages were allowed for the first respondent only under s. 7(3A) of the Act for bereavement in the amount of RM10,000. (para 15)

(4) In an appeal against quantum of damages, the appellant has a heavy onus to establish plainly that the trial judges award was a wholly erroneous estimate. The appellant has succeeded in the discharge of the onus (*Hang Jong Juan v. Tan Yeo Soon* (foll)). (para 17)

A **Per Abdul Aziz Mohamad JCA:**

(1) The question has to be decided by going back to the principal enactment of subsection (3) which lays down that the damages that may be awarded under the subsection are
B damages "for any loss of support". Loss of services or society is not loss of support and there has not been any suggestion by learned counsel for the respondents that loss of support for a child could include loss of the services or society of its mother. Since the expressed scope of the principal enactment
C is loss of support, for such damages to come within it or within s. 7 so as to be capable of being awarded, it must be expressly provided. (para 9)

Bahasa Malaysia *translation of headnotes*

D Pada 23 Ogos 1992, seorang wanita telah mati lemas ("simati") di dalam sebuah kolam renang yang dikendalikan oleh perayu. Responden pertama merupakan suami kepada simati sementara responden kedua sampai ketujuh merupakan anak kepada simati. Simati sebelum kematiannya merupakan seorang suri rumahtangga
E yang tidak memperolehi pendapatan dan telah menggaji seorang pembantu rumah untuk menolong di dalam pengendalian kerja harian di rumahnya. Selepas kematiannya, keluarganya telah menggaji seorang lagi pembantu rumah yang dibayar lebih kurang RM700 sebulan. Dalam bulan November 1996, responden pertama
F telah kahwin semula. Pada 10 Jun 1993, responden-responden telahpun memfailkan writ di Mahkamah Sesyen terhadap perayu atas dasar kecuaian perayu yang telahpun mengakibatkan kematian simati. Responden-responden telah memperolehi penghakiman terhadap perayu dan mahkamah telah menganugerahkan gantirugi
G am dan khas dalam jumlah menyeluruh (global) RM100,000 ("keputusan tersebut"). Perayu telah memfailkan rayuan ke Mahkamah Tinggi terhadap keputusan tersebut yang mana rayuan tersebut telah ditolak terhadap liabiliti dan kuantum dan perayu telah membuat rayuan kepada mahkamah ini.

H

Isu tunggal yang dibangkitkan oleh perayu melalui rayuan ini adalah sama ada anugerah gantirugi am yang diberikan oleh Mahkamah Sesyen yang kemudiannya telah dikekalkan oleh Mahkamah Tinggi dalam jumlah RM100,000 terlalu tinggi, tidak
I munasabah dan tidak disokong dalam semua keadaan kes.

Diputuskan (rayuan dibenarkan dengan kos dan jumlah RM100,000 yang dianugerahkan oleh Mahkamah Sesyen dan dikekalkan oleh Mahkamah Tinggi diganti dengan jumlah RM34,000)
Oleh Abdul Kadir Sulaiman & Hashim Yusoff HHMR:

(1) Yang Arif Hakim gagal untuk memberikan asas yang betul atau memadai untuk menyokong anugerah kepada responden dalam jumlah RM100,000 sebagai gantirugi am. Ianya hanya berdasarkan budibicara yang digunakan olehnya dalam perkara ini kerana tiada kayu ukur untuk menaksirkan jumlah yang tepat. Apabila kita berbincang mengenai penggunaan kuasa budibicara, ianya harus berdasarkan prinsip undang-undang yang diputuskan yang merupakan budibicara kehakiman dan bukannya budibicara sendiri. Yang Arif Hakim Mahkamah Sesyen dalam menganugerahkan jumlah menyeluruh (global) RM100,000 tersebut dengan kononnya menggunakan budibicaranya tanpa menunjukkan apa-apa asas dengan jelasnya merupakan suatu penyalahgunaan kuasanya dan atas bukti yang telah dibentangkan, terlalu tinggi.

(2) Responden pertama setelah kematian simati terpaksa menggaji seorang pembantu rumah tambahan untuk mengendalikan kerja-kerja harian rumah. Ini sememangnya merupakan suatu kerugian kewangan yang timbul secara terus daripada kecuaian perayu. Maka anugerah di bawah tajuk ini seharusnya diberikan RM24,000 – s. 7(3) Akta Undang-Undang Sivil 1956 ("Akta tersebut"), (*Neo Kim Soon (Administrator of the estate of Phanna Mannechuang, deceased) v. Subramaniam Ramanaidu & Anor* (diikuti)).

(3) Gantirugi di bawah s. 7(3A) Akta tersebut bagi kehilangan dianugerahkan hanya kepada responden pertama berjumlah RM10,000.

(4) Dalam suatu rayuan terhadap kuantum gantirugi, perayu menanggung beban yang berat untuk membuktikkan secara nyata bahawa anugerah hakim di tahap pendengaran merupakan suatu anugerah yang berasaskan anggaran yang jelas tersilap. Perayu disini berjaya membuktikan beban bukti tersebut (*Hang Jong Juan v. Tan Yeo Soon* (diikuti)).

Oleh Abdul Aziz Mohamad HMR:

(1) Pada pendapat saya, persoalannya harus diputuskan dengan merujuk kembali kepada subseksyen (3) yang menyatakan bahawa gantirugi yang boleh dianugerahkan di bawah subsekyen tersebut adalah gantirugi bagi "for any loss of support"/kehilangan sokongan. Kehilangan perkhidmatan atau masyarakat bukan kehilangan sokongan dan tiada cadangan dikemukakan oleh peguamcara responden bahawa kehilangan sokongan bagi kanak-kanak/anak boleh dirangkumi kehilangan perkhidmatan atau masyarakat ibunya. Memandangkan bahawa skop enakmen secara nyata adalah bagi kehilangan sokongan, untuk membolehkan gantirugi dirangkumi olehnya atau s. 7 untuk dianugerahkan, ianya harus diperuntukkan secara nyata.

Case(s) referred to:

Chong Pik Sing & Anor v. Ng Mun Bee [1985] 1 CLJ 332; [1985] CLJ (Rep) 70 FC ***(refd)***

Hang Jong Juan v. Tan Yeo Soon [1985] 1 CLJ 394; [1985] CLJ (Rep) 845 CA ***(foll)***

Neo Kim Soon v. Subramaniam Ramanaidu & Anor [1996] 1 CLJ 730 CA ***(foll)***

Ng Mun Bee & Ors v. Chong Pik Sin & Anor [1987] 1 MLJ 91 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 7(3), (3A), (3B)

For the appellants - S Anpalagar; M/s Anad & Noraini
For the respondents - MV Kumar; M/s MV Kumar

[Appeal from High Court, Kuala Lumpur; Civil Appeal No: R3-12-43-1999]

Reported by Sharmini Pillai

JUDGMENT

Abdul Kadir Sulaiman & Hashim Yusoff JJCA:

[1] This is an action under s. 7 of the Civil Law Act 1956 (hereinafter referred to as "the Act") brought in the Sessions Court by the respondents, who are the husband and the children of a lady drowned on 23 August 1992 in a swimming pool run by the appellant. The spouse is the first respondent and the children are the second to the seventh respondents. The deceased during her lifetime was a housewife earning no income. Prior to her death the household engaged a maid to assist them in the running of

the daily affairs of the household. By her marriage to the first respondent the deceased had 6 children, (the second to the seventh respondents), ranging in age from 4 years to 18 years old. After her death the family obtained the help of the aged mother of the deceased and an additional maid to assist in the daily running of the household and paying the additional maid around RM700 per month as wages. However, in November 1996, the first respondent, the deceased spouse, remarried. On 10 June 1993, the spouse and the 6 children of the deceased took out a writ in the Sessions Court against the appellant for negligence resulting in the death of the deceased.

[2] The respondents obtained judgment against the appellant for the negligent act and the court awarded special and general damages. As for the general damages, the court made a global award of RM100,000. The appellant appealed to the High Court against the said decision. The High Court subsequently dismissed the appellant's appeal both against liability and quantum. The appellant then brought this further appeal to us.

[3] The appeal before us limits it only to the issue as to whether the award of general damages made by the Sessions Court and subsequently affirmed by the High Court, amounting to RM100,000 is manifestly excessive, unjustified and unsupported in all the circumstances of the case. In other words, the liability and other consequential orders are no longer in dispute.

[4] It is the submission of the learned counsel for the appellant that as the deceased was not gainfully employed, no monetary loss was suffered by the respondents to entitle them for general damages. If at all any damages are due, it is only in respect of damages for bereavement provided by s. 7(3A) of the Act to the first respondent only, amounting to RM10,000, and the cost of hiring the additional maid after her death. The other respondents being the deceased's children are not entitled to any general damages. As the deceased was not a wage earner, the respondents are not entitled to the damages for loss of dependency under s. 7 of the Civil Law Act 1956. The learned counsel for the respondents on the other hand, in supporting the decisions of the Sessions Court and the High Court, urged upon us not to disturb the assessment made simply for the reason that this court would consider otherwise.

[5] For the High Court, the reason for the dismissal of the appellant's appeal on general damages of RM100,000 was as what was stated by the learned judge in his judgment that:

> In an appeal against the quantum of damages, it is settled law that the Appellants must establish that the award is an 'wholly erroneous estimate' …
>
> In respect of general damages, the learned Judge was fully appreciative that as a consequence of the negligence of the 1st Appellant, the Respondents had lost their mother and the 1st Respondent his wife …
>
> I accordingly dismissed the appeal with costs (in respect of both liability and quantum) in view of the fact that the trial Judge was fully appraised of the evidence and concluded with a correct finding of fact – …

[6] So as to ascertain whether the learned judge was correct or otherwise in his decision to dismiss the appeal, we need to scrutinize the judgment of the Sessions Court in awarding the sum of RM100,000 by way of general damages as this is the only issue brought before us to be resolved. As stated earlier, the liability and the quantum of special damages awarded are not in dispute before us.

[7] On the issue of general damages, this is what the learned judge of the Sessions Court said:

> Mengenai gantirugi am, jumlah yang dibenarkan ialah sebanyak RM100,000. Memang diakui adalah mustahil untuk menetapkan jumlah bagi 'pain and suffering' yang dialamai oleh kesemua plaintif-plaintif yang kehilangan isteri dan ibu mereka. Berapa banyak sekali pun gantirugi yang dibenarkan tidak dapat menggantikan kasih sayang seorang isteri dan ibu. Hanya masa yang berlalu yang dapat meringankan kesedihan yang dialami. Oleh itu gantirugi am wajar diberi kepada pehak plaintif. Walaupun tidak ada kayu ukur (yardstick) yang boleh digunakan bagi menaksir jumlah gantirugi, tetapi Mahkamah menggunakan budibicara dengan membenarkan jumlah RM100,000.

[8] We observe that no proper or adequate basis was given by the learned judge for awarding to the respondents the sum of RM100,000 as general damages. It was purely on the basis of exercising her discretion in the matter as there is no yardstick to work out for an exact figure. It is trite that when we talk of discretionary exercise of power, it must be based on settled legal principle, which is one of judicial discretion. It is not a personal

discretion in the sense that without adhering to any settled judicial principle, a figure is given in the name of discretion purportedly exercised.

[9] Under s. 7(3) of the Act, subject to the proviso, the damages which the party (the appellant in this case) who shall be liable to pay to the party for whom and for whose benefit the action is brought (in this case, the respondents) be such as will compensate the party for whom and for whose benefit the action is brought (the respondents) for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default of the party liable (in this case the negligent act of the appellant). (Emphasis is ours).

[10] Proviso (iii) to s. 7(3) of the Act, in as far as is relevant to this case states:

> (iii) no damages shall be awarded to a husband on the ground only of his having been deprived of the services or society of his wife.

[11] The said proviso concerns an award by way of general damages for loss of consortium because at common law, a husband could recover damages, *inter alia*, for the loss of the services provided by the wife. But an amendment to s. 7 of the Act changed all that. In *Neo Kim Soon (Administrator of the estate of Phanna Mannechuang, deceased) v. Subramaniam a/l Ramanaidu & Anor* [1996] 1 CLJ 730, Mahadev Shankar JCA delivering the judgment of this court said at p. 736 of which we associate ourselves:

> We agree with Mr Chok Chin You of counsel for the plaintiff/appellant that what has been done away with by the proviso (iii) is an award of damages, in this case to the deceased's husband, only on the ground that he has been deprived of the services or society of his wife. So far as a surviving husband is concerned, the proviso has abolished any award by way of general damages for loss of consortium. In other words, proof of the death of a wife, without more, will not entitle the surviving husband to an award in damages.
>
> It is a different matter altogether where a husband has not only lost his wife, but has also been put to monetary loss which has been the direct result of the negligence. Such loss in our view continues to be recoverable.

> We say this because s. 7(3) as it is presently worded not only empowers the court to compensate the claimant for any 'loss of support' but also for 'any reasonable expenses incurred as a result of the wrongful act'. We cannot agree with the respondents' counsel that the word 'together' in s. 7(3) must be read to mean that unless monetary loss is first shown by way of loss of support, the claim for reasonable expenses cannot be sustained.

[12] Applying that to the present case before us, the first respondent upon the death of the deceased, had to employ an additional housekeeper at the cost of about RM700 per month to continue with the running of the household on account of the death of the deceased. It is indeed a monetary loss which has been the direct result of the negligence of the appellant. Hence an award under this head ought to have been made in the first respondent's favour. As to the amount, since the first respondent remarried in November 1996, which was four years and two months after the death of the deceased on 23 August 1992, we think for the cost of hiring the additional maid, the damages to be awarded under this head would be calculated on the basis of monthly wage for the period of the deceased death to the time of remarriage which in our view, rounding up to a period of 4 years is just. This is so because by remarrying, the service of the deceased has been taken over by the new wife and consequently also, the service of the additional housekeeper has become legally redundant. As for the monthly wage we would consider a sum of RM500 per month would be fair and just. In the circumstances, the damages due to the first respondent as the spouse of the deceased would be 4 years x 12 months x RM500 which equals to RM24,000. As for the children of the marriage, ie, the second to the seventh respondents, no damages are awarded under this head. There would also be no award made for loss of support as such to any of the respondents because the deceased was not earning any income at the time of her death.

[13] By way of *obiter dictum*, Mahadev Shanker JCA in *Neo Kim Soon, supra*, at pp. 736-737 said:

> As a matter of interest, we observe that proviso (iii) does not preclude damages to a child for having been deprived of the services or society of his mother but we do not think that it is necessary for this appeal to say anything more about this except that it follows from what we have said that wherever it can be shown whether by a parent, a surviving spouse or a child that actual quantifiable loss has been incurred in money or money's worth and will continue to be incurred as a direct result of the

negligence of the wrongdoer, such loss will be recoverable even if there was no direct financial contribution made by the deceased to or on behalf of the person for whose benefit the action was brought.

[14] On our part we share the same view as expressed. However, in our case, there is no evidence to support that the children of the marriage ie, the second to the seventh respondents, had incurred any actual quantifiable loss in money or money's worth and will continue to be incurred as a direct result of the negligence of the appellant. For that reason no award should be made in favour of the said respondents in this action. No doubt each one suffered bereavement for the tragic loss of their mother. However, as will be seen later, under this head only the first respondent would benefit.

[15] Section 7(3A) of the Act also makes provisions for a claim for damages for bereavement limited to RM10,000 only but sub-s. (3B) thereof makes provisions for this nature of claim only for the benefit of, in relation to this appeal, the spouse of the person deceased. In this case, it is for the benefit of the first respondent only. No damages are allowable for the second to the seventh respondent under this head. Accordingly, a sum of RM10,000 is awarded to the first respondent as damages for bereavement.

[16] Consequently, upon the death of the deceased, the appellant is liable to the first respondent only as follows:

(a) For the cost of hiring an additional maid to replace the services rendered by the deceased to the extent of RM24,000 at the rate of RM500 p.m. for four years; and

(b) Damages for bereavement to the extent of RM10,000;

making a total of RM34,000 in all.

[17] The learned Sessions Court Judge made a global award of RM100,000 after having exercised her so-called discretion without any basis shown. This clearly is a wrong exercise of her power and on the evidence the amount awarded by her is manifestly excessive. Her decision cannot therefore stand. This court as the ultimate appellate court in the matter can intervene to correct the error. In *Hang Jong Juan v. Tan Yeo Soon* [1985] 1 CLJ 394; [1985] CLJ (Rep) 845 it was held that in an appeal against the quantum of damages, it is settled law that the onus on the appellant is a heavy one and it must establish plainly that the trial

judge's award was a wholly erroneous estimate. Indeed by the evidence produced in our present case, the appellant has succeeded in the discharge of the onus. The learned judge of the High Court similarly has committed an error in law when he affirmed the decision of the Sessions Court on this issue of general damages by saying:

> In respect of general damages, learned Judge was fully appreciative that as a consequence of the negligence of the 1st Appellant, the Respondent had lost their mother and the 1st Respondent his wife.

when the evidence available does not support the giving of so much award by way of general damages by the learned judge of the Sessions Court.

[18] In the circumstances, the appeal is allowed by substituting the amount of general damages of RM100,000 awarded by the Sessions Court and subsequently affirmed by the High Court, with the amount of award of RM34,000 as mentioned above with costs to the appellant. Deposits to be refunded to the appellant.

[19] Our learned brother, Abdul Aziz Mohammad JCA, having read this draft, has written a separate judgment agreeing with us as to the award to the first respondent of RM10,000, being damages for bereavement but disagreeing with us as to the additional award of RM24,000 to the first respondent being the cost of hiring an additional maid for four years at RM500 per month to replace the services rendered by the deceased prior to the remarriage of the first respondent in November 1996.

Abdul Aziz Mohamad JCA:

[20] This was a claim for damages under s. 7 of the Civil Law Act 1956. The dispute in this appeal is over the award of general damages for the respondents in the sum of RM100,000. In the Sessions Court, the respondents had claimed RM190,000 as general damages, the sum being apportioned as follows: RM50,000 for the first respondent, the husband of the deceased, and, for the second to the seventh respondents, the children of the deceased, RM30,000, RM20,000, RM20,000, RM20,000, RM20,000 and RM30,000 respectively. The Sessions Court judge awarded RM100,000 without apportioning it. It is apparent from the penultimate paragraph of her grounds of judgment that she intended the sum to be compensation for the pain and suffering caused to the respondents by the loss of their wife and mother. The award was upheld by the High Court on appeal.

[21] In this appeal, the respondents' only contention is that they are entitled to damages for loss of the services or society of the deceased and they seek to justify the award on that basis. A

[22] According to subsection (3) of s. 7, the damages that may be awarded under the section shall be such as will compensate the wife, husband, parent and child of the deceased person "for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default" that caused the death of the deceased person. The subsection has a proviso in four paragraphs. By para. (iii): B C

> no damages shall be awarded to a parent on the ground only of his having been deprived of the services of a child; and no damages shall be awarded to a husband on the ground only of his having been deprived of the services or society of his wife.

[23] It is clear from the express provision of the second limb of para. (iii) that the first respondent is not entitled to damages for loss of the services or society of his wife. The question is whether the other respondents, the children, are entitled to damages for loss of the services or society of their mother. D E

[24] The respondents cited one case in which children were awarded damages for loss of the services of their mother, namely, *Ng Mun Bee & Ors. v Chong Pik Sin & Anor.* [1987] 1 MLJ 91, in which three children were awarded compensation for loss of the services of their mother, but, going only by the judgment of the High Court, that case is inapplicable to the present case because the claim for damages in that case is said at p. 91 A-B (right) not to be one under s. 7. There was no appeal against that finding, except as regards quantum. See *Chong Pik Sing & Anor. v. Ng Mun Bee & Ors.* [1985] 1 CLJ 332; [1985] CLJ (Rep) 70, at p. 434 bottom left. Going by the Supreme Court's judgment (reported two years earlier than the High Court's), it would appear that the action was in fact brought under s. 7. Nevertheless the case is still inapplicable to the present case, because it is apparent that the action was brought under the previous subsection (3), which read: F G H

> In every such action the Court may give such damages as it thinks fit proportioned to the loss resulting from the death to the parties respectively for whom and for whose benefit the action is brought … I

A The key words were "loss resulting from the death", where "loss" was not confined, whereas the present subsection (3) confines loss to "loss of support".

[25] Of the cases that they cited in their skeletal submission, the B respondents placed foremost reliance on *Neo Kim Soon v. Subramaniam a/l Ramanaidu & Anor* [1996] 1 CLJ 730, where this court held that the husband of the deceased woman was entitled to recover the expenses of employing a housekeeper that had to be employed to look after their infant son as a result of the death C of his mother. This court treated the expenses as falling within the words "any reasonable expenses incurred as a result of the wrongful act" in subsection (3). But it is not on that decision that the respondents rely. They are not claiming the expenses incurred in employing someone to look after the children under the D "reasonable expenses incurred" limb of subsection (3). They are claiming damages for loss of the services or society of the deceased and they rely on the following observations of Mahadev Shanker JCA:

> E As a matter of interest, we observe that proviso (iii) does not preclude damages to a child for having been deprived of the services or society of his mother but we do not think that it is necessary for this appeal to say anything more about this …

[26] The learned High Court judge, in para. 7 of his grounds of F judgment, referred to those observations but it is not clear whether he upheld the award of general damages on the strength of those observations, on the basis that the damages were for loss of services or society, because in para. 8 he seems to agree with the Sessions Court judge that the damages were for pain and G suffering caused to the respondents, which, of course, are not claimable under s. 7, except as to bereavement under subsection (3A), which is limited to RM10,000 and which, according to subsection (3B), shall only be for the benefit of the spouse.

H **[27]** I do not think that the observations of Mahadev Shanker JCA, aside from their being about a question that did not arise for decision, should be construed as a finding by this court that damages may be awarded to a child under s. 7 for loss of the services or society of its mother. The thing that was observed was I what paragraph (iii) of the proviso does not expressly do. If "preclude", the word used in the passage, were taken to mean "exclude", it is true that para. (iii) does not exclude such damages for a child. The paragraph only excludes such damages for a

husband. But does the non-inclusion of such damages for a child mean that they are included, that is, included not in para. (iii) – which cannot be, because it is an exclusionary paragraph – but included in the principal enactment of subsection (3)? I read Mahadev Shanker JCA's saying "but we do not think that it is necessary for this appeal to say anything more about this" to mean that more thinking needed to go into the question. Even if the dictum could be construed as indicating a thinking that a child could be awarded such damages, I think it was merely a tentative thinking.

[28] I am of opinion that the question has to be decided by going back to the principal enactment of subsection (3), which is that part of it that comes before the proviso and which lays down that the damages that may be awarded under the subsection are damages "for any loss of support". Loss of services or society is not loss of support, and there has been no suggestion by learned counsel for the respondents that loss of support for a child could include loss of the services or society of its mother. I do not think that the non-exclusion by para. (iii) of the proviso of such damages for a child impliedly includes such damages within the principal enactment of subsection (3), because that would enlarge its scope. Since the principal enactment is confined to loss of support (besides reasonable expenses) I do not comprehend why proviso (iii) needs to exclude damages for loss of services or society, something that is not included in the principal enactment in the first place. But whatever the reason may be, I do not think that the failure of proviso (iii) to further exclude loss of services or society for a child results in its inclusion in the principal enactment of subsection (3), thereby enlarging its scope. On the contrary, since the expressed scope of the principal enactment is loss of support, for such damages for a child to come within it or within s. 7 so as to be capable of being awarded, it must be expressly provided.

[29] I would, therefore, allow the appeal with costs and set aside the award to the extent of RM90,000, leaving RM10,000 as damages for bereavement for the first respondent, which have been conceded.